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SUMMARY

NextWave's subsidiary, NextWave Personal Communications Inc., is a C block PCS licensee, and is a potential participant in any reauction of the C block licenses returned under the options outlined by the Commission in its C block Financing Order. As such, NextWave has substantial interest in the modifications to the proposals that the Commission proposes regarding reauction of surrendered C block PCS spectrum. In the attached comments, with regard to the reauction of C block licensees, NextWave specifically proposes that the Commission:

- Reauction all C Block spectrum simultaneously and modify its eligibility for participation, so that all C block licensees can fully participate in any reauction;
- Consider minor modifications to its competitive bidding design, including adopting a requirement that all bids be submitted electronically (with emergency backup) and that it adopt more aggressive Stage I, II and III activity levels;
- Set the upfront payment requirement at \$.02 per MHzPOP, which is consistent with other auctions and does not present an excessive barrier to entry for small businesses;
- Continue to permit the legitimate use of bid withdrawals in order to preserve bidder flexibility;

- Generally apply its current rules governing anti-collusion, with the adoption of a “safe harbor” for legitimate business discussions not related to bids or bidding strategy; and
- Adopt the proposed designated entity rules with clarifications.

Furthermore, the Commission should complete its Part 1 Proceeding prior to adopting rules governing the reaction of the surrendered C block spectrum. Many of these potential rules changes have critical bearing on C block licensees’ choice of options.

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
)	
Amendment of the Commission's Rules)	
Regarding Installment Payment)	WT Docket No. 97-82
Financing for Personal Communications)	
Services (PCS) Licenses)	
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Comments of NextWave Telecom Inc.

I. INTRODUCTION

NextWave Telecom Inc. (NextWave) respectfully submits its comments in response to the above-captioned Federal Communications Commission (FCC or Commission) Further Notice of Proposed Rule Making.¹ NextWave's subsidiary, NextWave Personal Communications Inc., is a C block PCS licensee, and is a potential participant in any reauction of the C block licenses returned under the options outlined by the Commission in its C block Financing Order.² As such, NextWave has substantial interest in the modifications to the proposals that the Commission proposes regarding reauction of surrendered C block PCS spectrum.

¹ *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97-82, (rel. Oct. 16, 1997) (*Second Report and Order, Further Notice*).

² See Second Report and Order at para. 6.

II. NEXTWAVE'S COMMENTS ON PROPOSALS REGARDING THE REAUTION OF SURRENDERED LICENSES

A. The FCC Should Reaution All C Block Spectrum Simultaneously and Modify Its Eligibility for Participation

We agree with the FCC proposal to include in the reaution disaggregated spectrum and all licenses surrendered by the election date as well as all PCS C block licenses held by the Commission as a result of previous defaults. NextWave agrees with the FCC that “by including all available licenses in the reaution, the Commission can efficiently and fairly speed service to the public. In addition, offering all available licenses will allow for the most efficient aggregation of licenses.”³

NextWave generally agrees with the Commission’s statement in the *Second Report and Order* that all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees should be eligible to bid in the reaution. However, the Commission should clarify these eligibility criteria. We agree with the Commission’s proposal to permit all current C block licensees to participate in any reaution, even those that under the asset and revenue caps would currently be ineligible. While it is reasonable for all C block licensees to be allowed to participate in a reaution, the Commission should clarify that licensees that exceed the revenue caps and no longer qualify as small businesses should be precluded from the use of bidding credits as it would unfairly advantage these larger, better capitalized, entities, and would undermine the purpose of the bidding credits.

³ *Further Notice* at para. 83.

Secondly, just as we would not request that the Commission restrict participation in a reauction of those C block licensees that currently exceed the revenue and asset caps, we would urge the Commission to reconsider its decision in the *Second Report and Order* to restrict the participation of C block licensees who choose the disaggregation or prepayment options.⁴ While NextWave will address these concerns more fully in its petition for reconsideration, we believe such concerns are directly relevant to this discussion of eligibility to participate in a reauction.

In the *Second Report and Order*, the Commission restricts an entity that chooses the disaggregation or prepayment options from fully participating in any reauction of this spectrum. In particular, licensees that choose these options will be prohibited from acquiring any of their returned spectrum in a reauction or in the secondary market for two years following the reauction. On the other hand, under the so-called “amnesty” option, the Commission will allow an entity that returns *all* of its spectrum or only a portion of it (the “built out” exception) to fully participate in any reauction.⁵ The Commission does not provide a rational basis for differential treatment of licensees that choose the “amnesty” option and return all their licenses and those that choose the prepayment or disaggregation option and return some or a portion of their licenses. The Commission further exacerbates this differential treatment through its “built-out” exception, which favors those who may have applied capital to build a single market over those who have applied capital broadly to build several markets.⁶

⁴ *Second Report and Order* at paras. 42, 69.

⁵ *Id.* at para. 54.

⁶ It will also be difficult to assess whether a company meets the five-year build-out requirement if it is only offering limited service. For example, in September a C block licensee announced that it had turned up service in Philadelphia, but was not actively seeking customers. See *Omnipoint Announces ‘Soft Launch’ of Philadelphia Market*, (Sept. 25, 1997).

Not only is the discriminatory treatment reflected in the Commission's recently adopted rules on participation in the C block reauction unreasonable, but, by restricting participation these rules undermine one of the Commission's auction policy objectives, that is, to "encourage growth and competition for wireless services and . . . the rapid deployment of new technologies" by awarding licenses to those who value them most highly.⁷ The Commission's action artificially restricts competition for the licenses and thus will depress bid prices. Only by treating all C block licensees equally and allowing full participation can the Commission ensure a reauction that generates a fair market value for the surrendered spectrum.

B. The Commission Should Consider Minor Modifications to Its Competitive Bidding Design

NextWave agrees with the Commission's tentative conclusion that all available C block licenses should be awarded in a single, simultaneous multiple round auction.⁸ Over the past three years, after having conducted numerous successful auctions, the Commission has refined its bidding procedures and has proved that this auction methodology is best suited to services such as PCS, where geographic markets are highly interdependent.

The Commission also tentatively concludes that bidding should be allowed only by electronic means, rather than by telephone.⁹ While we agree that the Commission's electronic bidding system works well, neither the system nor bidders are infallible. Therefore, we urge the

⁷ See *In the Matter of Implementation of Section 309(j) of the Communications Act*, Second Report and Order, PP Docket No. 93-253, (rel. Apr. 20, 1994) at para. 5.

⁸ *Further Notice* at paras. 86-88.

⁹ *Further Notice* at para. 89.

Commission to provide telephonic backup of its electronic bidding system in the case of an emergency.

Furthermore, we agree with the Commission's tentative conclusion that the reauction should be conducted in three stages with high initial activity requirements. The Commission has determined that the auction should be conducted with a Stage I activity level requirement of 80 percent, a Stage II requirement of 90 percent, and a Stage III requirement of 98 percent. In recent auctions such high initial activity requirements have become the norm rather than the exception¹⁰ and are therefore unlikely to present difficulties to either the FCC or to bidders.

Finally, with regard to competitive bidding procedures for a C block reauction, the Commission specifically proposes to delegate authority to the Wireless Bureau to aggressively schedule bidding rounds, quickly transition into the next stage when activity falls, and to use higher minimum bid increments for very active licenses.¹¹ While NextWave understands that the Commission wishes to rapidly reauction this spectrum, we would urge the Commission to continue its practice of reviewing potential changes with bidders and soliciting online input, and not to encourage practices that aggressively accelerate bidding at the expense of the integrity of the auction

¹⁰ Recently, in both the D, E and F block PCS auction and the ongoing 800 MHz SMR auction the FCC has required these same activity levels.

¹¹ *Further Notice* at para 91.

C. The Commission Should Require an Upfront Payment that is Consistent with Other Auctions and Does Not Present Small Businesses With an Excessive Barrier to Entry

In its *Further Notice*, the Commission proposes to set the amount of the upfront payment at \$.06 per MHz POP.¹² This is the equivalent of \$1.80 per POP for 30 MHz C block licenses, and \$.90 per POP for disaggregated (15 MHz) C-block licenses. This is the largest upfront payment requirement for participation in a PCS auction that the Commission has ever required, and as such would be a barrier to entry for small businesses. While on its face this payment may appear to be the same upfront deposit requirement as for the D, E and F block auction, this is not so. Because of the 10 MHz size of the D, E, and F block licenses, a \$.06 per MHzPOP upfront payment equates to only \$.60 per pop per license. At \$.06 per MHzPOP, entrepreneurs participating in a C block reauction would have to commit up to three times the upfront payment that incumbent wireless operators had to commit in the A and B block auction to be eligible for the same number of pops.

As further evidence that a \$.06 per MHzPOP upfront payment is too high, the Commission need only look to the amount refunded to D, E, and F block winning bidders. Ninety percent of D, E, and F block winning bidders received refunds after the auction closed, the majority of which were small businesses. The actual amount refunded to participants was more than \$200 million. Since a conservative estimate of the cost of capital for small businesses is at least 15 percent, these businesses had to forego approximately \$15 million to keep an excess \$200 million on deposit at the FCC for six months. This clearly creates a significant barrier to

¹² *Id.* at para 94.

entry for small businesses. The upfront deposit requirements should be no more onerous than for the A and B block PCS auction, or \$.02 per MHzPOP.

D. The Commission Should Continue to Permit the Legitimate Use Of Bid Withdrawals

The Commission tentatively concludes that the general auction procedures governing withdrawal in the reauction should be based on procedures established in its general competitive bidding rules.¹³ NextWave agrees with the Commission's previously stated position that bid withdrawals are a necessary tool that allow bidders to shift bidding strategies or correct erroneous bids.¹⁴ Bid withdrawals are particularly important in simultaneous, multiple round auctions, where there are many interdependent licenses. While we encourage the Commission to adopt procedures to discourage misuse of bid withdrawals, we do not believe that, for example, allowing only two withdrawal rounds per bidder during the entire course of an auction, as was recently adopted for the 800 Specialized Mobile Radio Service (SMR) auction,¹⁵ provides for a sufficient degree of flexibility.

In a recent letter to former FCC Chairman Reed Hundt, the Department of Justice Antitrust Division (DoJ) took the opportunity as part of the *Part 1 Proceeding* to suggest ways to ensure that the auction process remain competitive, including suggestions to manage the use of bid withdrawals.¹⁶ NextWave believes that DoJ's expertise in policing anticompetitive behavior

¹³ *Further Notice* at para. 98.

¹⁴ *See In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket No. 97-82, (rel. Feb. 20, 1997) (*Part 1 Proceeding*) at para. 93.

¹⁵ "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (Sept. 5 1997).

¹⁶ Letter of Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice to Reed Hundt, Chairman Federal Communications Commission (dated Oct. 8, 1997, filed with FCC Secretary Oct 17, 1997) (*DoJ Letter*).

will help improve the auction process when balanced with the FCC's considerable auction expertise developed to date. For example, while DoJ has encouraged the Commission to adopt the 800 SMR auction withdrawal rules for all auctions, in the same letter DoJ acknowledges that "withdrawals are widely used to manage eligibility levels," but that, while this might be legitimate use of bid withdrawals, such use also may delay the close of an auction.¹⁷

While NextWave appreciates this concern,¹⁸ it suggests that in a competitive and lengthy auction, permitting only two withdrawal rounds per bidder may "lock up" eligibility and preclude the many bidders who legitimately use bid withdrawals from efficiently aggregating spectrum.¹⁹ In addition, as a result of a bidder not being able to access its eligibility, such a rule could have the perverse effect of depressing bid prices. We would encourage the FCC to adopt the spirit of the DoJ's proposal, but, in order to preserve the purpose of bid withdrawals in a simultaneous multiple-round auction, to offer two bid withdrawals per market instead of only two bid withdrawal periods during the entire auction.

E. The FCC Should Apply Its Current Rules Governing Anti-Collusion to This Auction

NextWave agrees with the Commission that it should apply its existing collusion rules to this auction. NextWave recognizes the difficulty inherent in ensuring a competitive auction, and

¹⁷ *Id.* at 7.

¹⁸ NextWave also has observed that bid withdrawals can be used to extend the close of the auction. NextWave understands that by allowing all bidders to use this important tool, certain bidders may attempt to "game" the system. NextWave has observed that misuse of bid withdrawals, while inappropriate at any time in an auction, is particularly problematic when used at the end of an auction to the extent that such behavior prolongs the auction. To help alleviate this problem, in its reply comments to the *Part 1 Proceeding*, NextWave recommends that Stage IV be created, after which a bidder that withdraws from a market may not re-bid in the same market. Stage IV could be triggered when bid activity falls below a certain level, such as five percent of the bidding units, indicating that the auction is nearly ended. Such a proposal will allow bidders the flexibility to use bid withdrawals as the Commission intends, while still ensuring that the auction closes within a reasonable amount of time. See NextWave Reply to *Part 1 Proceeding* at 9.

¹⁹ DoJ notes that only three firms (or less than three percent of the total number of winning bidders) were

thus the importance of preventing collusive behavior. As described by DoJ, the Commission in forming its anti-collusion rules “recognized the need to strike a balance between preventing collusion and facilitating the formation of efficiency-enhancing bidding consortia that pool capital and expertise and reduce entry barriers for smaller firms that otherwise might not be able to compete in the auction process. If the anti-collusion rules were too strict or overbroad, they might have a chilling effect on legitimate business transactions.”²⁰

The Commission’s rules, and subsequent clarifications, strike the balance that DoJ describes, particularly with regard to small businesses. Moreover, in its *Part 1 Proceeding*, the Commission proposes a “safe harbor” that, if adopted, would allow auction participants to engage in discussion of merger, acquisition or intercarrier (roaming and resale) agreements, if they certify that they will not discuss bidding strategy or otherwise divulge bid information in violation of the Commission’s anti-collusion rules.²¹ However, DoJ has urged the Commission to exclude from its safe harbor the negotiation of resale and roaming agreements “for markets in which [parties] are currently bidding against each other.”²² NextWave believes that to exclude from such a safe harbor roaming and resale negotiations would be harmful to most businesses, but would be particularly harmful to small businesses.

In the first place, the class of potential licensees that will result from the C block auction are already years behind the incumbent A and B block licensees in the development of their businesses. Such a restriction would further widen this gap between entrepreneurs and incumbents, and seems particularly unfounded when considered against the active intercarrier

responsible for nearly 50 percent of the withdrawn bids. *Id.*

²⁰ DoJ Letter at 9.

²¹ *Part 1 Proceeding* at para. 102.

²² *DoJ Letter* at 11.

negotiations that were ongoing throughout the incumbent wireless carriers' A and B block auction. Restricting discussions of potential resale agreements seems particularly counter-productive, since these arrangements generate a competitive environment, rather than restrict it. Furthermore, since under FCC regulation, a carrier would have to extend the same terms and conditions to any similarly-situated reseller,²³ it is unlikely that resale agreements negotiated during an auction would differ from those negotiated after an auction.

DoJ also suggests that such a "safe harbor" would not be necessary, if an auction progresses quickly.²⁴ While NextWave agrees that prohibition from talking to other carriers about a variety of business transactions would be less onerous during a short-duration auction (30 days or less from Form 175 filing to close of auction), and we agree that certain steps can still be taken that would have a marginal impact on the speed of an auction, we believe that the Commission has already taken most of the steps available to it to speed auctions to conclusion without undermining the integrity of its auction process.²⁵ NextWave believes that the relative speed of an auction is ultimately determined by the number of licenses, number of active applicants, and to a lesser degree, the "excess eligibility." As a result, the ultimate duration of an auction is unpredictable. For example, the D, E and F block auction, which had 1,479 licenses and 151 bidding entities, but very low excess eligibility, progressed quite slowly even though FCC staff increased minimum bid increments, lengthened the bidding day, and moved to several rounds per day. Because of the large number of licenses and bidders the D, E, and F block

²³ 47 C.F.R. § 20.12

²⁴ *DoJ Letter* at 11.

²⁵ Furthermore, contrary to DoJ's statement, "click box" bidding, in fact, *slows* an auction, since a bidder cannot bid more than the bid increment, it will take more steps to reach the ultimate market price. *Id.* at 11, n. 15.

auction still took nearly five months to complete. Furthermore, we believe that had the Commission been even more aggressive with some of its methods for increasing the pace of the auction, the auction still would have lasted nearly as long. Because of the difficulty inherent in predicting or controlling an auction's duration, a general prohibition during an auction of legitimate business discussions, or even a more narrow prohibition of roaming and resale discussions, would shift the balance in favor of incumbents and would certainly disproportionately harm new entrants.

F. The Commission Should Adopt Its Proposed Designated Entity Provisions with a Clarification

In the *Further Notice*, the Commission proposes to adopt a tiered bidding credit system based on the same definition of a "Very Small Business" and a "Small Business" that it used in the F block auction.²⁶ In the C block reauction, however, Very Small Businesses, or businesses with revenues below \$15 million would receive a 35 percent bidding credit and Small Businesses, or businesses with revenues between \$15 and \$40 would receive a 25 percent bidding credit. Bidders with revenues above \$40 million would not receive a bidding credit. We agree with the Commission's proposal; however, we would urge the Commission to clarify that C block licensees that are allowed to participate in the reauction, yet exceed the revenue caps, would be ineligible for bidding credits. As NextWave states *supra*, such C block licensees should be permitted to participate, but not be permitted to take advantage of any bidding credits.

²⁶ See *Further Notice* at para. 100. See also 47 C.F.R. §§ 24.720(a)(1),(2).

III. THE FCC SHOULD COMPLETE ITS PART 1 PROCEEDING PRIOR TO ADOPTING RULES GOVERNING THE REAUCTION OF SURRENDERED C BLOCK LICENSES.

NextWave has previously stated its support of certain FCC proposals to change Part 1 of the Commission's rules.²⁷ In the *Part 1 Proceeding*, the Commission seeks to "establish a uniform set of provisions" governing spectrum auctions.²⁸ We agree that the Commission should standardize its rules for all services yet to be auctioned, and that these rules should supersede existing service-specific auction rules. Furthermore, resolution of many issues raised in the *Part I Proceeding* is critical to giving C block licensees a meaningful opportunity to evaluate and implement the alternative payment options established in the *Second Report and Order*, which they must choose among by the "election date" established in that order.

In particular, NextWave agrees with the Commission's general efforts to streamline its rules regarding affiliation, ownership, and "controlling interest thresholds." In its *Part I Proceeding*, the Commission proposes to use a simpler "controlling interest threshold" to determine whether an entity qualifies as a small business.²⁹ Companies would not have to adopt artificial and complex "control group" structures in order to comply with the eligibility rules. In

²⁷ See NextWave Reply to *Part I Proceeding*. For example, the Commission proposes to extend the pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed. *Part I Proceeding* at 109. Permitting pre-grant construction, in addition to adopting the Commission's proposal in the *Further Notice* to decrease the time allowed for petitions against a licensee (*see Further Notice* at 96), will decrease the time penalty imposed on legitimate applicants, and may decrease the incentive to file a frivolous pleading.

²⁸ *Part I Proceeding* at para. 4.

²⁹ *Part I Proceeding* at para. 28.

theory, the control group rules were designed to provide a simple, well defined “safe harbor” for determining control. The Commission already has determined elsewhere that application of traditional control tests is better than imposing specific equity requirements on the controlling principals.³⁰ This rule change would also eliminate much of the complexity of the control group structure, relying instead on existing standards and case law. As has been borne out in auction licensing processes to-date, despite complex control group rules, the Commission ultimately evaluates who controls a company based on its assessment of both *de jure* and *de facto* control of the company. NextWave believes that any such rule change should apply to existing service-specific auction rules. Furthermore, the Commission should allow existing licensees to restructure their ownership accordingly.

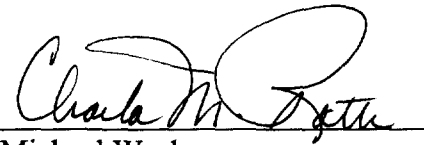
Such ownership issues could have critical bearing on which option a licensee would choose to adopt. As a result, NextWave believes that the FCC should complete its *Part 1 Proceeding* expeditiously, and allow licensees a commercially reasonable time thereafter to evaluate the alternative payment options provided in the *Second Report and Order*.

³⁰ See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Tenth Report and Order, PP Docket 93-253, (rel. Nov. 16, 1996) at para. 16.

IV. CONCLUSION

For the foregoing reasons, NextWave respectfully urges the Commission to adopt the changes to its auction rules as described herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charla M. Rath", written over a horizontal line.

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